
GUARDIANSHIPS AND CONSERVATORSHIPS IN SOUTH CAROLINA

**South Carolina Court Administration
1994**

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INTRODUCTION

If a person is substantially unable to handle his or her personal or financial affairs, it may be necessary to establish a guardianship and/or conservatorship through the Probate Court (hereinafter referred to as court) for the protection of that person and/or his assets.

In South Carolina, a **guardianship** involves the appointment of an individual (a guardian) to handle personal/custodial matters for an incapacitated adult (ward). The incapacity may be due to mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that the individual lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person or property. [Guardianships in Probate Court only involve incapacitated adults. Guardianships for minors are under the jurisdiction of the Family Court.]

The primary responsibilities of the guardian are to decide where the ward will live and make provisions for the ward's care, comfort, and maintenance, including medical and health care decisions.

A **conservatorship** or other protective proceeding involves the management of financial affairs or property.

Conservatorships may be established for an incapacitated adult or for a minor. In either case, a court must determine that there is money or property (the estate) requiring management or protection which cannot otherwise be provided.

The primary responsibilities of the conservator are to manage and protect the property and to report periodically to the court about the assets, receipts and disbursements of the estate.

In some cases, there will be both a guardianship and a conservatorship for an incapacitated adult.

All guardianships and conservatorships are under court supervision. It is the court's responsibility to make certain that the guardianship or conservatorship is functioning in the best interests of the protected person. It is the guardian's and conservator's responsibility to follow the court's instructions and to always act in the best interest of the protected person.

PROTECTIVE PROCEEDINGS

Guardianships and conservatorships are defined as protective proceedings because they involve protection of a person and/or property. Let us look at the LEGAL PROCESS by which they are established.

GUARDIANSHIP

1. **Venue** – The law specifies WHERE proceedings are to take place. This is called venue. Venue for guardianship proceedings is in the county where the incapacitated person resides or is present. (If the incapacitated person is admitted to an institution under a court order, venue is also in the county where that court sits.
 2. **Petition** – An incapacitated person or any person interested in his welfare may petition the court (in the appropriate county of venue) for a finding of incapacity and appointment of a guardian. The petition (Form #530PC) provides the court with details about the case, including the reason or basis for the alleged incapacity.
 3. **Visitor** – Upon the filing of a petition, the court appoints a special Visitor who will go to the place where the allegedly incapacitated person resides to observe conditions and report in writing to the court. The report is made on Form #531PC.
 4. **Attorney** – Unless the allegedly incapacitated person has an attorney of his own choice, the court will appoint an attorney to represent him in the proceedings.
 5. **Examiners** – The court will appoint two examiners, at least one of whom must be a physician, to examine the allegedly incapacitated person and report in writing to the court.
 6. **Notice** – The law requires at least twenty (20) days notice (Form #110PC) of the proceeding be given to:
 - a. the allegedly incapacitated person and his spouse, parents, and adult children;
 - b. any person serving as his guardian, conservator, or who has his care and custody; and
 - c. in case no other person named under “a” above has been notified, at least one of his closest adult relatives if any can be found.
- This gives interested persons an opportunity to attend the hearing or otherwise be informed of the matter.
- The court may require proof that notice was given (Form #120PC).
- And in some instances, more than 20 days notice is necessary.

7. **Hearing** – The court generally conducts a hearing to receive testimony and make determinations concerning the case.

The court may appoint a guardian, dismiss the proceeding, or issue any other appropriate order.

8. **Filing Fees and Compensation** – Filing fees are set by law and must be paid to the court; generally, if an appointment is made, the fees are paid from the estate of the incapacitated person. Attorneys, examiners, visitors, and others may be entitled to reasonable compensation for services as determined by the court.

CONSERVATORSHIP – ADULT

1. **Venue** – The law specifies WHERE proceedings are to take place. This is called venue. Venue for conservatorship (and certain other protective) proceedings is in the county in this State where the person to be protected resides (whether or not a guardian has been appointed in another county or state); or if the person to be protected does not reside in this State, in any county where he has property (in this state).

2. **Petition** – The person to be protected, any person who is interested in his estate, affairs, or welfare, or any person who would be adversely affected by lack of effective management of his property and affairs may petition the court (in the appropriate county of venue) for the appointment of a conservator or for other appropriate protective order.

The petition (Form #540PC) provides the court with details about the case, including information about the assets and the reason or basis for the protection.

3. **Attorney** – Unless the person to be protected has an attorney of his own choice, the court will appoint an attorney to represent him in the proceedings.

4. **Examiners** – If the alleged disability is mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, or chronic intoxication, the court will appoint one or more physicians to examine the person and report to the court.

5. **Notice** – The law requires at least twenty (20) days notice (Form #110PC) of the proceeding be given to the person to be protected and his spouse, parents, and adult children, or, if none, his parents or nearest adult relatives if there are no parents. This gives interested persons an opportunity to attend the hearing or otherwise be informed of the matter.

The court may require proof that notice was given (Form #120PC). And in some instances, more than 20 days notice is necessary.

6. **Hearing** – The court generally conducts a hearing to receive testimony and make determinations concerning the case. The court may appoint a conservator, dismiss the proceeding, or issue any other appropriate order.
7. **Filing Fees and Compensation** – Filing fees are set by law and must be paid to the court; generally, if an appointment is made, the fees are paid from the estate of the person to be protected. Attorneys, examiners, and others, including the appointed conservator, may be entitled to reasonable compensation for services as determined by the court.
8. **Bond** – The law requires bond in conservatorship proceedings. Bond is like an insurance policy for the protected person conditioned on the conservator carrying out his duties faithfully and appropriately. Bond is based on the amount of the total value of the protected person's personal property (excluding real estate), plus one year's estimated income.

CONSERVATORSHIP – MINOR

1. **Venue** – The law specifies WHERE proceedings are to take place. This is called venue. Venue for conservatorship (and certain other protective) proceedings is in the county in this State where the person to be protected resides (whether or not a guardian has been appointed in another county or state); or if the person to be protected does not reside in this State, in any county where he has property (in this state).
The petition (Form #540PC) provides the court with details about the case, including information about the assets and the reason or basis for the protection (in this case, minority).
The court may also request other documents, such as a copy of the minor's birth certificate.
2. **Petition** – The person to be protected, any person who is interested in his estate, affairs, or welfare, or any person who would be adversely affected by lack of effective management of his property and affairs may petition the court (in the appropriate county of venue) for the appointment of a conservator or for other appropriate protective order.
3. **Attorney** – If, at any time in the proceeding, the court determines that the interests of the minor are or may be inadequately represented, it may appoint an attorney to represent the minor. The court will give consideration to the minor's choice of representation if the minor is fourteen (14) years of age or older.
4. **Notice** – The law requires at least twenty (20) days notice (Form #110PC) of the proceeding be given to the person to be protected and his

spouse, parents, and adult children, or, if none, his parents or nearest adult relatives if there be no parents. This gives interested persons an opportunity to attend the hearing or otherwise be informed of the matter.

The court may require proof that notice was given (Form #120PC).

And in some instances, more than 20 days notice is necessary.

5. Hearing – The court generally conducts a hearing to receive testimony and make determinations concerning the case. The court may appoint a conservator, dismiss the proceeding, or make any other appropriate order.

6. Filing Fees and Compensation – Filing fees are set by law and must be paid to the court, generally from the estate of the minor. Attorneys, examiners, and others, including the conservator, may be entitled to reasonable compensation for services as determined by the court.

7. Bond – The law requires bond in conservatorship proceedings. Bond is like an insurance policy for the minor conditioned on the conservator carrying out his duties faithfully and appropriately. Bond is based on the amount of the total value of the protected person’s personal property (excluding real estate), plus one year’s estimated income.

OTHER PROTECTIONS

Remember, the court’s involvement is based on the existence of needs (e.g., care and maintenance) which are not otherwise being met. Additionally, the appointment of a “long-term” guardian or conservator is not the only remedy available. For example, the court may appoint a temporary guardian or a special conservator for special purposes. The idea is to protect, not punish, and to create the least restrictive environment that best meets the needs of the circumstances and people involved.

RESPONSIBILITIES

GUARDIAN

As “guardian of the person”, you basically have the same powers, rights, and duties regarding your ward that a parent has in regard to his minor children. You will make many decisions concerning the ward, such as where the ward will live and how meals, personal care, transportation and recreation will be provided. The level of your involvement will, of course, depend on the degree of personal supervision needed by the ward and instructions of the court.

In terms of the ward’s environment, consider safety as well as comfort. Be sure the ward is receiving appropriate recreation and social stimulation.

Respect the ward’s preferences, but be sure these are balanced against common sense (e.g., nutritional needs). If you feel the ward requires special assistance, ask the court about exploring various social service agencies or organizations in your area (see Other Resources listed in these materials). You should try to discuss decisions with the ward before acting. In choosing among alternatives, try to select the one that preserves the personal independence, dignity and lifestyle of the ward to the greatest extent possible consistent with your ultimate responsibilities as guardian.

Always keep the ward’s best interest in mind.

In addition to taking care of your ward, you must take reasonable care of the ward’s clothing, furniture, vehicles, and other personal effects.

You may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care or treatment. This may include major hospital related decisions in addition to regular checkups. Again, you will want your ward to participate in these decisions to the extent you feel he is able.

All guardians must report to the court at least once a year (and as often as required by the court) regarding the physical and mental condition of their wards and any property under their control. This report is submitted on a special ANNUAL REPORT (Form #534PC). A sample is included in the forms section of these materials.

The ANNUAL REPORT will ask if there has been any change in your ward’s physical or mental condition, if there have been any new health care needs, and if there has been a change of address or telephone number. **You must advise the court if you or your ward has moved!**

If there is no conservator for the ward, you must also report to the court concerning any financial matters which you have handled. If a conservator has been appointed, all of the ward’s estate received by you in excess of those funds expended to meet current expenses for support, care and education of the ward must be turned over to the conservator for management. You should report to the conservator regarding the expenditures under your control. You may find it helpful to keep a monthly ledger that itemizes expenses. A sample

is included in the forms section of these materials. You will need to keep receipts and other documentation as appropriate.

If you are the guardian and also the conservator for the ward, you will report to the court on all financial matters, as is explained in the conservator portion of these materials.

Being a guardian is a serious legal appointment which carries important

responsibilities to your ward and to the court. As a court-appointed guardian, you submit personally to the jurisdiction of the court. It is important to follow the court's instructions. It is also important to remember that the court is there to assist. Although court staff cannot give legal advice, they will be able to answer many of your questions and may be aware of other resources to assist you in carrying out your duties.

CONSERVATOR

As conservator of the assets/estate, it is your responsibility to manage and use the protected person's property for his or her benefit. Property may include cash, uncashed checks, bank accounts, stocks, bonds, notes receivable, partnership interests, life insurance policies, real estate, furniture, jewelry and automobiles, as well as the right to receive payments from the government, insurance companies, employers and trusts.

One of the protections required by law is that you furnish a BOND. Bond is like an insurance policy conditioned on the conservator carrying out his duties faithfully and appropriately. The bond is based on the amount of the total value of the protected person's personal property (excluding real estate), plus one year's estimated income. The bond may be adjusted as needed (e.g., assets increase or decrease).

Letters of Conservatorship transfer all assets of a protected person to the conservator. These LETTERS (Form

#140PC) must be FILED and RECORDED in the office where conveyances of real estate are recorded for the county in which the protected person resides (whether or not there is real estate in that county) and in the other counties where the protected person owns real estate. Upon termination of the conservatorship, the order terminating it must also be filed in those county offices. Recording the letters of conservatorship will put others on notice that you are managing the protected person's property. This should prevent any unauthorized sale or mortgaging of the protected person's real property. (There will be a filing fee for filing these documents. In some counties, the Probate Court may collect this fee and file the documents for you.)

Within thirty days after appointment, every conservator must file with the court a complete INVENTORY (Form #550PC) of the protected person's property. You may be required to provide copies to specific persons. For example, a copy of the inventory must be given to the protected person if he is 14 years of age or older and to the parent

or guardian with whom he resides. A sample inventory is included in the forms section of these materials.

In the case of an adult protected person, the court may required a BUDGET to project income and expenses. If the court approves a specific budget, it may then be necessary to get court approval for expenditures outside of that budget. In the case of minor protected persons, the parent has a legal responsibility for maintenance and care. Therefore, it is almost always necessary to get court approval before any expenditure.

The conservator must keep SUITABLE AND WELL-DOCUMENTED RECORDS and show them on demand to any interested person.

All accounts for the protected person should be titled as follows:

_____ (conservator name) AS CONSERVATOR FOR _____ (protected person's name).

You should use the protected person's social security number for the accounts, not your own. Use the checking account to deposit all receipts and pay all expenses. Checks should indicate a reason for the disbursement. Record each receipt and expenditure in a ledger or notebook so you will have the details necessary for the accounting which you are required to prepare and submit to the court.

You must keep the protected person's property separate from your property at all times. NEVER put your money in the conservatorship account OR the

protected person's money in your account(s).

It may be advisable to place valuables in a safety deposit box or other secure location. You should also maintain appropriate insurance on the minor's/protected person's property (such as vehicles or homes).

Conservators must file an ACCOUNTING (Forms #560PC, #561PC, or 562PC) with the court:

- a. annually, from the date of appointment;
- b. upon resignation or removal;
- c. upon termination of the protected person's minority or disability; and
- d. at other times as the court directs.

Accountings must show, to the court's satisfaction, those assets which were received on behalf of the protected person and where such property came from, as well as what property left the estate and where it went. These accountings must be substantiated by receipts, cancelled checks, and any other proofs the court may request. The court may also require a physical check of the estate. That is why it is so important to keep accurate records. For monthly expenses, there is a sample ledger in the forms section of these materials. There are also sample accountings forms.

Conservators may not acquire, dispose of or change the character of an estate asset without court approval. For example, real estate cannot be sold

without prior notice, a hearing before the court, and issuance of a Court Order.

Any transaction involving the conservator or his/her spouse, or any entity in which he/she has a substantial or beneficial interest must be approved by the court.

A conservator is a fiduciary and is subject to a trustee's standard of care – "prudent person rule." The "prudent person rule" means that a conservator must exercise the sound judgment and care that a prudent person acting as a fiduciary familiar with such matters would exercise under the circumstances then prevailing. There is no excuse for a conservator to say he would have acted in the same way if he were dealing with his own money if the actions taken do not conform to the rules laid down for trustees in the management of a protected person's property.

A conservator may petition the court for instructions on a fiduciary's responsibility. After notice and hearing, the court may issue any appropriate order.

The conservator is entitled to reasonable compensation as determined by the court. Therefore, it should only be paid **after** court approval.

Conservators should report to the court promptly any changes of address of either the conservator or the protected person. If the protected person dies or experiences a significant improvement in health, the conservator must also report that to the court.

Upon the death of the protected person, the conservator must deliver to the court the Will of the protected person, if one exists. The conservator should inform the named Personal Representative that the Will has been filed with the court. Then the conservator should petition to close the conservatorship immediately, completing all legal requirements, such as filing a final accounting.

In the case of a minor protected person when the minor reaches age 18, the conservator must petition for discharge and complete all financial requirements to close the conservatorship.

OTHER RESOURCES

There may be services and organizations in your community which provide assistance in a variety of areas. Consider checking the phone book, especially the yellow pages, and calling some of these, especially the Council on Aging. Types of services and organizations may include:

Adult Day Care:

There are centers which generally provide meals, therapy services and activities for ambulatory adults who need assistance of supervision. Some may provide transportation to physician appointments.

These centers generally provide meals, therapy services and activities for ambulatory adults who need assistance or supervision. Some may provide transportation to physician appointments.

Associations:

There are various organizations which can provide information and referral services, as well as limited assistance. Look in the yellow pages for listings.

Deaf Services and Facilities:

There may be specialized services for deaf and/or hard of hearing persons in your community. The State Library for the Deaf and Blind may also have services of interest to you.

Blind Services and Facilities:

There may be specialized services for blind persons in your community. The Stat Library for the Deaf and Blind may also have services of interest to you.

Home Delivered Meals:

These programs usually operate on weekdays only to provide a hot meal to a person's residence.

Churches/Religious Organizations:

Many of these offer a variety of programs or other assistance.

Home Health Services:

Skilled intermittent health care as ordered by a physician which may include registered nurse, various therapies and home health aide services for the homebound patients. These services are usually covered by Medicare, Medicaid and various insurances when medically necessary to provide skilled assessment of an unstable medical condition, patient instruction, skilled nursing care, physical, occupational, or speech therapy.

Congregate Meals:

These hot meals are provided in a group setting.

Fee-for-service care may include nursing services, personal care, homemaker services, transportation, etc. Some of

Counselors – Human Relations:

Counselors are generally listed by their area of specialty.

Day Care Centers – Adult:

these services may be covered by insurance.

Homemaker Services:

Trained personnel may be available to provide assistance with household tasks and personal care.

Hospital Equipment and Supplies:

These companies usually handle durable medical equipment such as wheelchairs, walkers, hospital beds, respiratory therapy equipment, etc. Many will bill Medicare and insurance companies directly. The suppliers may also have medical supplies such as wound dressings, catheters, nutritional supplements and tube feeding supplies, ostomy supplies, etc.

Legal Services:

There may be services to arrange/provide assistance in non-criminal legal matters and the protection of legal rights by an attorney or para professional.

Nurses:

See “Home Health Services.”

Nursing Homes or Rest Homes:

There are skilled as well as basic care facilities. Medicare may be available when nursing care or therapies are required. Basic care facilities are private-pay.

Protective Services:

Provided by the Department of Social Services, these services are intended to

investigate allegations of abuse and/or neglect.

Rehabilitation:

Various therapy services may be available (physical, occupational, and speech).

Respite Care:

Respite care provides caregivers of long-term care patients’ temporary relief.

Retirement and Life Care Communities and Homes:

These usually include day care facilities, nursing homes, retirement residential centers, etc.

Social Services Organizations:

There are numerous organizations which provide services. Check the yellow pages or ask your government social service agencies.

Social Support Services:

In some communities, there may be structured programs of leisure activities to enhance socialization skills and prevent isolation for elderly individuals.

Telephone Reassurance Programs:

These programs, where available, may offer to call an elderly or homebound individual one or more times a day or week to “check” that things are okay.

Transportation:

These may include transportation to various locations, for example, medical care, an agency, a program, etc.

GLOSSARY OF COMMON TERMS

BOND – an insurance type policy in which the insurance/bonding company agrees to reimburse the estate if the fiduciary steals from, loses, or otherwise mismanages assets of the protected person.

COURT – the Probate Court having jurisdiction (authority) in these matters.

CONSERVATOR – a person who is appointed by a court to manage the estate/assets/property of a protected person.

DISABILITY – cause for a protective order as described in the law.

ESTATE – all property of any description belonging to a protected person.

FIDUCIARY – includes guardian, conservator, personal representative, and trustee; indicates a position of “trust” and responsibility (e.g., manage and protect someone’s assets).

GUARDIAN – a person who has qualified as a guardian of an incapacitated person pursuant to court appointment.

GUARDIAN AD LITEM – a person appointed by the court to represent the interests of a specific individual (e.g., minor or incapacitated adult) for a specific purpose (e.g., hearing).

INCAPACITATED PERSON – any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person or property.

INTERESTED PERSON – includes anyone having a property right in or claim against the estate of a ward or protected person which may be affected by a proceeding. (The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, the proceeding.)

JURISDICTION – generally speaking, authority.

LETTERS – includes letters of guardianship and letters of conservatorship indicating the court’s appointment.

MINOR – in South Carolina, a person under the age of eighteen.

PETITION – a written request to the court to do something, usually resulting in the issuance of an order by the court.

PROCEEDING – includes action at law and suit in equity; usually involves a court hearing

GUARDIANSHIP PROCEEDING – a proceeding to determine if a person is an incapacitated person or to appoint a guardian for an incapacitated person.

PROTECTIVE PROCEEDING – a proceeding to determine if a person is an incapacitated person, or to secure the administration of the estates of incapacitated persons or minors.

[Note: When both guardianship and protective proceedings as to the same person are commenced or pending in the same court, the proceedings may be consolidated.]

PROTECTED PERSON – a minor or incapacitated person for whom a conservator has been appointed or other protective order has been made.

VENUE – established by law, sets forth the county WHERE a proceeding must take place.

WARD – a person for whom a guardian has been appointed.